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Michael A. Wolff

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Making Judge-Speak Clear Amidst the Babel of Lawspeakers

Michael A. Wolff

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MAKING JUDGE-SPEAK CLEAR AMIDST THE BABEL OF LAWSPEAKERS

By Michael A. Wolff¹

*The fault, dear Brutus, lies not in our stars but in ourselves*²

Rising above (or below) my assigned topic – how journalism covers court decisions and the courts as an institution – I would like to focus on how courts express themselves, because the clarity of their expressions affects the quality of the public discussions they prompt.

I was profoundly influenced by Anthony Lewis' great book, *Gideon's Trumpet*, which was assigned reading in a college course in Government not long after its publication. I was editor of the daily student newspaper, The Dartmouth, and had a faint interest in law (some of my judicial and professorial colleagues may believe my interest remains faint). I knew very few lawyers, however, and I had only a vague notion of what lawyers do, other than what one gathers from movies and television. Following college, I worked as a copy editor and reporter for The Minneapolis Star while attending law school at the University of Minnesota. I approach today's topic from the lowly vantage point of a recovering reporter.

¹ Michael A. Wolff is Dean and Professor of Law at Saint Louis University School of Law. He served from 1998 to 2011 on the Supreme Court of Missouri and was chief justice from 2005 to 2007.

² William Shakespeare, Julius Caesar, Act I, scene ii.

Gideon's Trumpet taught us something about how to educate the public about law, about how to communicate law in a way that the public will understand it and respect it.³ Cases are stories about real people. The legal journalism spawned by *Gideon's Trumpet* has deepened public understanding and appreciation of American law and has served as an important counterweight to the shallow criticisms of lawyers, judges, and lawmakers that populate the ever-proliferating media, much of which currently functions, apparently, without the need for editors.

Early in my legal career, I was a law clerk in federal district court, and I drafted orders and opinions that were the kind of ordinary legal analysis that one can acquire in law school. The intended audience was either the judge for whom I clerked, or, should he decide to put it out as a decision or opinion, the audience might be the lawyers in the case, their clients, and lawyers in the community or those who are interested in the kind of case that was being decided. The judge for whom I clerked believed, probably correctly, that few district court opinions were worth reading and so he seldom chose opinions to publish in the Federal

³ See Adam Liptak, "Anthony Lewis, 1927-2013: Reporter Brought Law to Life, Elevating Supreme Court News," NEW YORK TIMES at A1, March 25, 2013, available at http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html?_r=0; see also Andrew Cohen, "The Life and Death of Anthony Lewis – a 'Tribune of the Law,'" THE ATLANTIC, March 25, 2013, available at <http://www.theatlantic.com/national/archive/2013/03/the-life-and-death-of-anthony-lewis-a-tribune-of-the-law/274332/>.

Supplement Reporter. In short, our words were intended usually for a very small audience. As such, they were written in code or the jargon of judicial opinion writing, part of the secret language that we, who are members of the Amalgamated Lawyers and Judges of America, use to keep our shop closed.

Forty years ago, the idea that a Court might have a public information officer, for example, was unimaginable. It was even more absurd to imagine that a reporter could call a judge and ask the judge what he or she meant by a particular turn of phrase. Reporters, from the mainstream media (or should I say “only-stream” media?) of newspapers, television, and radio were left to their own wits to ascertain what a judicial opinion might mean and to try to communicate that interpretation to the public.

As law became more of a publicly traded commodity in the 1990s, courts, including the Supreme Court of Missouri, began to hire public information officers. It may strike you as odd, when you think about it, as to why a court that communicates with words should need someone assigned to explain to the wordsmiths of the media – and sometimes to the public itself—what judges meant by the collections of words in their judicial opinions. But today, we take it for granted that public information officers are essential to the operation of a state supreme court, and although in the abstract I find this to be curious, I was happy to have worked with the court’s Communications Counsel, Beth Riggert,

who is part of this symposium. Beth was very valuable in helping me write speeches and monthly newspaper columns when I was chief justice, and I frequently solicited editorial suggestions on draft opinions circulating to my colleagues on the Court.

What about judicial communications? We lawyers and judges write words. Judges, legislators, and executive branch officials use words to express something we call “law.” Law, of course, is nothing if it is not communicated and if it is not understood both by those writing it and those who receive it.

Let me go back, for a moment, to the oral tradition of medieval societies that had “lawspeakers.” In Iceland and in Scandinavian countries, the “lawspeaker”—an official position in Iceland beginning in the 10th century—memorized law and recited law so that people would know what the law was.⁴

Do we have “lawspeakers” today? Are they the attractive former prosecutors who came to populate cable news when O.J. Simpson’s case gave us occasion to obsess about law and its relation to race, sex, and justice? But enough about Greta Van Whatever Do our lawspeakers include the justices of the Supreme Court of the United States, who read their opinions from the bench, but cannot get their minds around the idea that television is outside the doors of their courtroom waiting and

⁴ Judy Quinn, *From Orality to Literacy in Medieval Iceland*, in *OLD ICELANDIC LITERATURE AND SOCIETY* 30, 32 (Margaret Clunies Ross ed., 2000). I owe this analogy to a college project done 15 years ago by my son Ben, now a lawyer with the Bronx Defenders.

wanting to make them media stars? Are lawspeakers the members of Congress who make impassioned speeches in the chambers of the House and Senate where there is hardly anyone present except the one that matters – the C-SPAN camera?

Few people actually read law in its original source works. Who wades through excessive pages of court opinions or the Byzantine structures of the Affordable Care Act? We the public rely on those who read law to tell us what it is. In that sense, we may be little better informed than those in the medieval public who were not within earshot of the lawspeaker, but who heard about what the lawspeaker said from someone who heard it from someone else who said he heard it firsthand. Both the medieval information seeker and the modern citizen may suffer from misinformation. But when law is transmitted, either orally or in some written fashion, distortions are bound to occur.

In my early days of teaching law, I taught medical students and I was impressed by how much “law” the medical students already knew. I came to regard hospitals—teaching hospitals they are called—as places where law is communicated as readily as iatrogenic infections. Let me give you an example. Forgive me, lawyers and students, if you already know this case from your Torts class. A generation ago the Supreme Court of Washington held that an ophthalmologist doing an eye examination was negligent for not doing a glaucoma test to detect glaucoma in its early stages, regardless of the age of the patient. The

standard of care at the time was that the glaucoma test was not done on patients who were under the age of 40. In the case, *Helling v. Carey*,⁵ the patient was less than 40 years old, but the Supreme Court of Washington said that the profession's standard of care was inadequate. That holding of the state Supreme Court of Washington affected only the common law of Washington as it relates to medical negligence and, as such, was subject to revision by the legislature of that state. Within a few years of the decision, when I was in my early 30s, I was having an eye examination by an ophthalmologist, and he said he was going to do a glaucoma test. When I asked him why he was doing it, he said that "the law" required it. I was in St. Louis, Missouri, a half a continent away from the State of Washington, and I knew that the courts of Missouri and the legislature of Missouri had made no such law. I am sure, however, that the report of the Washington Supreme Court decision was carried prominently in journals and magazines that ophthalmologists and optometrists regularly read. And those who read the journals passed the word along to their fellow practitioners that this is indeed what "the law" requires. We might refer to this phenomenon as the "holy crap" effect of law, as in, "holy crap now we've got to do this because the courts say have to do it."

Sometimes judicial decisions from afar will cause firestorms nearby. I was on the Supreme Court of Missouri when the Supreme

⁵ *Helling v. Carey*, 519 P.2d 981, 982 (Wash. 1974).

Court of the United States decided the case of *Kelo v. the City New London, Connecticut*,⁶ the famous eminent domain case that involved the taking by eminent domain of some beachfront property in New London by a process that started with the declaration of blight by the city council – a legislative body to be sure – that was carried out under the law as it was written in the legislature of Connecticut. The United States Supreme Court, in determining that the eminent domain was being used for a “public purpose,” merely deferred to the determination by the local legislative body under state law. Notwithstanding the judicial modesty in that deference, the United States Supreme Court—and courts generally—were vilified for the decision. The Court itself was blamed for taking the property of the beleaguered property owners whose valuable land was being seized so that a more economical use could be developed. I agree with the critics that the taking of property was an injustice, but the critics were blaming the wrong branch of government. In the midst of the nationwide controversy, some intrepid members of our own legislature – not wanting to be left out of a righteous fight – introduced resolutions to change the Constitution of Missouri to make it clear that the finding of a public purpose should not be done by a legislature or a city council but should be determined by the courts.⁷ I thought this was a fine tribute to courts as, perhaps, the least corruptible branch of government. But the author of the resolution

⁶ See *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

⁷ HJR 24, 93rd Gen. (Mo. 2006).

proclaimed that it was the court’s problem that he was trying to solve. The resolution went nowhere, probably because someone who actually knew the Constitution of Missouri pointed out that the Missouri Constitution has very specific protections against the abuse of eminent domain, including a provision that a finding of public purpose is to be determined judicially, and not by legislative action.⁸

As another example, there is a current Missouri controversy that persists called the “Turner problem.” In *Turner*, the Supreme Court of Missouri said that the law requires a school district that loses accreditation to pay for its students who choose to attend school in an accredited district.⁹ What is impressive is the number of times I saw and heard this referred to as a problem caused by the Supreme Court of Missouri. Indeed, the Court has dealt with the problem on two occasions, and on both occasions has said that the requirement of the law is precisely as the legislature wrote it.¹⁰ The Court was not making it up. It was convenient for the politicians to blame the courts for the confusion this is causing when their predecessors who passed the law did not explain how it should be implemented – it was convenient until

⁸ Mo. Const. art. I, § 26 (2013).

⁹ *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. 2010). See RSMo. § 167.131 (2009) (“The board of education of each district in this state that does not maintain an accredited school pursuant to the authority of the state board of education to classify schools...shall pay the tuition of and provide transportation...for each pupil resident therein who attends an accredited school in another district of the same or an adjoining county.”).

¹⁰ *Breitenfeld v. School Dist. of Clayton*, 399 S.W.3d 816, 820 (Mo. 2013).

the public figured out that the problems actually could be worked out through legislation. That may occur someday. Do not hold your breath.

Judges and courts live in a world where there are many ways that their decisions and opinions can be interpreted and misinterpreted. Early on in my 13 years on the Missouri Supreme Court, I came to believe that the audience I was writing for is the nonlawyer public and the litigants, not the lawyers. I also came to believe, under the influence of my early days in journalism, that the legal cases can be good stories if the story of the case is well told. Stories make legal principles understandable. The story of Clarence Earl Gideon, in which Anthony Lewis was an early leader in the form of journalism that has been frequently replicated, teaches us who write legal opinions about the way to communicate.

I always have believed that judges should strive to make their opinions clear and interesting. There are thousands of legal opinions, and an awful lot of them are not particularly worth reading for they are neither very clear nor interesting and frequently are redundant.

To promote clarity, we copy the best of what journalism does. In a talk to the managing editors of Missouri's newspapers some years ago, I mentioned that we judges all should write – as we were told as journalists – for the fifth grade reader. One editor interrupted me to say it is now sixth grade, which depresses me slightly because it is a

commentary on the state of public education. Whether fifth or sixth grade, judges can promote clarity as follows:

- Use a “lede” – a first sentence that says something about the case and gets the reader’s attention;
- Summarize upfront: Let the reader know what the issues are and what the decision is;
- Where there is more than one issue (or “point” as we say in Missouri), use subheadings to identify each issue being discussed and put them in the same order as the introductory summary.
- Avoid jargon, starting with the words “plaintiff,” “appellant,” “respondent” etc. A reader is less likely to get lost if you call parties by their names. If you must use legal code phrases, explain briefly and immediately, so the reader will feel just as smart as the writer. When the reader feels stupid, he or she stops reading.
- Avoid stringing together a bunch of case citations in the text – a major case will do; the rest can go in footnotes. Footnotes will show the reader that the judge’s law clerk has read all the pertinent cases.
- At the end, summarize succinctly what the court’s decision is, and if the case is to be remanded to a lower court or

administrative tribunal, tell the court and parties what they must do.

It is a bit more difficult to say how courts can make their routine cases more interesting, and thus, more capable of being understood. The routine nature of many a case reminds me that a judge is sort of like Elizabeth Taylor's seventh husband—the judge knows what he's supposed to do, but he's not sure he can make it interesting. And unlike the advice one might give to the husband, if you cannot make it interesting, at least make it brief (fewer trees will die).

If the case is routine, there might be something interesting about the parties. We have to tread lightly, of course, so that we treat the parties and the witnesses in a case with respect. When I was assigned to write an opinion about a fellow who refused to sign his property tax declaration because the required oath ended with “so help me God,” I could not help but start the opinion with the following sentence: “Robert E. Oliver, an atheist residing in Christian County, ...”¹¹ I don't know if reader got the joke – but what is an atheist doing living in Christian County? By the way, we did not strike down the statute, but we told Mr. Oliver that he was free to cross out the words “so help me God” and his oath would be just as good. Same goes for our own writing: it can be just as good with fewer words. So help me God.

¹¹ *Oliver v. State Tax Com'n of Missouri*, 37 S.W.3d 243, 245 (Mo. 2001).

I close by answering a question that may have occurred to you – my assigned topic was about how journalism covers the courts and I took your time to discuss how judges should do a better job of explaining themselves. Here’s the point: Judges cannot control what journalists say, so they should focus on what judges can control. If judges feel journalists are not getting them right, the first thing to do is make sure judges are speaking law as clearly as they can. “The fault, dear Brutus, lies not in our *media* stars, but in ourselves.....” When I rewrite Shakespeare, it is time to end, so help me God.